

1 EILEEN M. DECKER
2 United States Attorney
3 LAWRENCE S. MIDDLETON
4 Assistant United States Attorney
5 Chief, Criminal Division
6 A. CARLEY PALMER (Cal. Bar No. 307303)
7 GEORGE E. PENCE (Cal. Bar No. 257595)
8 Assistant United States Attorneys
9 1200 United States Courthouse
10 312 North Spring Street
11 Los Angeles, California 90012
12 Telephone: (213) 894-0282/2253
13 Facsimile: (213) 894-0141
14 Email: carley.palmer@usdoj.gov
15 George.pence@usdoj.gov

16 Attorneys for Plaintiff
17 UNITED STATES OF AMERICA

18 UNITED STATES DISTRICT COURT

19 FOR THE CENTRAL DISTRICT OF CALIFORNIA

20 UNITED STATES OF AMERICA,

No. CR 15-00595 RGK

21 Plaintiff,

GOVERNMENT'S OPPOSITION TO
DEFENDANT'S "MOTION IN LIMINE TO
EXCLUDE 414 EVIDENCE PURSUANT TO
FEDERAL RULES OF EVIDENCE 403
AND THE UNITED STATES
CONSTITUTION"

22 v.

23 ANGELO HARPER, JR.,

24 Defendant.

25 Trial Date: July 19, 2016
26 Trial Time: 9:00 a.m.
27 Location: Courtroom of the
Hon. R. GARY
KLAUSNER

28 Plaintiff United States of America, by and through its counsel
of record, the United States Attorney's office for the Central
District of California and undersigned counsel, hereby files its
opposition to defendant's "Motion in Limine to Exclude 414 Evidence
Pursuant to Federal Rules of Evidence 403 and the United States
Constitution."

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This opposition is based upon the attached memorandum of points and authorities, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: July 17, 2016

Respectfully submitted,

EILEEN M. DECKER
United States Attorney

LAWRENCE S. MIDDLETON
Assistant United States Attorney
Chief, Criminal Division

/s/
A. CARLEY PALMER
GEORGE E. PENCE
Assistant United States Attorneys

Attorneys for Plaintiff
United States of America

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant is charged with advertisement of child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(A), (e). On July 12, 2016, defendant pleaded guilty to distribution of child pornography in violation of 18 U.S.C. §§ 2252A(a)(2)(A), (b)(1), and possession of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B), (b)(2). Trial of this case, which is now limited to advertisement of child pornography, is scheduled for July 19, 2016. Defendant has waived trial by jury.

On July 11, 2016, defendant filed a motion in limine to exclude his admissions, post-Miranda and audio-recorded, that he sexually assaulted young children, including his infant/toddler niece ("Motion"). (Dkt. 40.) The government opposes that motion for the reasons outlined below.

II. PERTINANT FACTS

A summary of the charged conduct is set forth in the government's Trial Brief; Motion in Limine No. 1 to Admit, and Permit Publication of, Child Pornography Images; and Motion in Limine No. 2 to Admit Evidence of Defendant's Commission of Other Offenses of Child Molestation. (Dkt. Nos. 47-49.) The government hereby incorporates those facts by reference, and only discusses additional facts specifically pertaining to this motion.

On August 26, 2015, defendant advertised child pornography in the Kik¹ #NEPILOVERS chatroom -- a group devoted to "All the things

¹ Kik is a social media mobile device platform. Users download the mobile messaging application via an application service such as Google Play Store or Apple iTunes. Once downloaded and installed, the user is prompted to create an account and a username. This

1 toddler n nepi,"² -- by posting two images of infant/toddler
2 pornography,³ and the following statements: (1) "U guys like toddler
3 boys or girls?";⁴ (2) "I have pics and vids of both [winking face
4 emoji].";⁵ and (3) "I have tons of pics and vids of little boys and
5 girls. Pm me for chat and trade of kids under 6 [winking face
6 emoji]."

7 On October 13, 2015, during the investigation of defendant's
8 advertisement and distribution on the #NEPLILOVERS chatroom,
9 Immigration and Customs Enforcement Homeland Security Investigations
10 ("ICE HSI") Special Agent ("SA") Jonathon Ruiz interviewed
11 defendant. During that interview, defendant admitted that he had
12 sexually assaulted his infant/toddler niece on at least two
13 occasions, and that he had photographed one of those assaults.⁶

14 **III. RELEVANT LAW**

15 At trial, the government will prove that defendant sexually
16 exploited a child in violation of Section 2251(d)(1)(A), (e) of
17

18 username acts as the primary account identifier. Kik Messenger
19 allows users to create chatrooms for the purpose of exchanging
messages, images, and videos.

20 ² "Nepi" refers to "nepiophilia," a type of pedophilia that involves
a sexual preference for infants and toddlers.

21 ³ One image shows, underneath its infant subject, a piece of paper
displaying the message "WAN2TR." The message "WAN2TR" possibly
22 reads in full "WAN2TRADE"; but the remaining letters in that image,
if any, are obscured.

23 ⁴ An "emoji" is a small digital picture or pictoral smbol that
24 represent a thing, feeling or concept, used in text messages and
other electronic conversations.

25 ⁵ "PM" is an abbreviation for "private message," a private form of
communication between different members on an online platform.

26 ⁶ Defendant also admitted to molesting a second young child, and of
being accused of molesting a third. The government does not intend
27 to introduce, in its case-in-chief, evidence of either of these
assaults.

1 Title 18 of the United States Code. In order to secure defendant's
2 conviction, the government must prove that: (1) the defendant
3 knowingly made, printed, published, or caused to be made, printed,
4 or published, an advertisement; (2) the advertisement offered to
5 receive, exchange, buy, produce, display, distribute, or reproduce
6 any visual depiction, if the production of the visual depiction
7 utilized a minor engaging in sexually explicit conduct and such
8 visual depiction is of such conduct; and (3) the defendant knew or
9 had reasons to know the advertisement would be transported across
10 state lines or mailed, or such advertisement was actually
11 transported across state lines or mailed. Ninth Cir. Model Crim.
12 Jury Inst. No. 8.183 (2010) (Sexual Exploitation of Child – Notice
13 of Advertisement Seeking or Offering) (modified to reflect that
14 crime does not require proof of the identity of a particular minor
15 victim).

16 "Advertisement" means a posting that has the purpose of
17 advising others that child pornography is available. United States
18 v. Grovo, No. 15-30016, -- F.3d --, 2016 WL 3443691, at *8 (9th Cir.
19 June 23, 2016) ("The means of publication or broadcast are not the
20 definitive features of an 'advertisement,' so long as the
21 advertisement calls attention to its subject or makes a particular
22 thing known."). An advertisement need not specifically state it
23 offers or seeks a visual depiction of a minor engaging in sexually
24 explicit conduct. United States v. Rowe, 414 F.3d 271, 277 (2d Cir.
25 2005) (Title 18, United States Code, section 2251(c) (now codified
26 at 18 U.S.C. § 2251(d)) "is not so narrow that it captures only
27 those who state, 'I have child-pornographic images for trade.'");
28 Grovo, 2016 WL 3443691, at *9 (citing Rowe approvingly).

1 **IV. ARGUMENT**

2 In its Motion, defendant raises four arguments, all of which
3 must fail.

4 **A. THE CONSTITUTIONALITY OF FEDERAL RULE OF EVIDENCE 414**

5 First, defendant challenges the constitutionality of Federal
6 Rule of Evidence 414, which provides that in a criminal case for a
7 child molestation charge, such as the instant advertising charge,⁷
8 evidence of other child molestation offenses are admissible for any
9 matter to which they are relevant, including as proof of defendant's
10 sexually predatory tendencies. Fed. R. Evid. 414(a). However, the
11 Ninth Circuit has repeatedly affirmed the constitutionality of Rule
12 414. See, e.g., Doe ex rel. Rudy-Glanzer v. Glanzer, 232 F.3d
13 1258, 1268 (9th Cir. 2000); United States v. LeMay; United States v.
14 Sioux, 362 F.3d 1241, 1244 (9th Cir. 2004) (recognizing that Rule
15 414 supersedes the general bar of Rule 404(b) against the admission
16 of propensity evidence); (see also Dkt. 50, "Government's Motion in
17 Limine No. 2 to Admit Evidence of Defendant's Commission of Other
18 Offenses of Child Molestation," at 10-12).

19 **B. THE EVIDENCE OF DEFENDANT'S SEXUAL ASSAULT OF HIS NIECE**

20 Second, defendant argues that his recorded, post-Miranda
21 confession to sexually assaulting his niece is "uncorroborated."
22 However, defendant admitted to these acts of molestation, in a
23 confession that was freely-given, audio-recorded, and remarkably
24

25 ⁷ The statutory definition of "child molestation offenses" is broader
26 than the colloquial meaning. See Fed. R. Evid. 414(d)(2)(B),
27 (noting that "child molestation" includes, e.g., "contact between
any part of the defendant's body. . . and a child's genitals or
anus," and "a crime under federal law or under state law involving
certain conduct, including "any conduct prohibited by 18 U.S.C.
chapter 10[,]" i.e., child pornography offenses).

1 detailed. Defendant has shown no reason, and the government has
2 found no reason in the record, to doubt the veracity of defendant's
3 admission. Moreover, SA Ruiz, the ICE officer who obtained and
4 recorded defendant's confession, will testify at next week's trial.
5 To the extent that defendant wishes to either cross-examine SA Ruiz
6 regarding his confession, or to admit affirmative evidence
7 contradicting its contents, he can do so at trial.

8 **C. "UNFAIR PREJUDICE" UNDER FEDERAL RULE OF EVIDENCE 403**

9 Third, defendant argues that his admissions regarding his
10 sexual assaults are "highly prejudicial" and thus inadmissible under
11 Federal Rule of Evidence 403. However, because Rule 414 is a rule
12 of inclusion, the law requires exclusion of relevant evidence only
13 when "the probative value of evidence is 'substantially outweighed
14 by the danger of unfair prejudice.'" United States v. Bailleaux,
15 685 F.2d 1105, 1111 (9th Cir. 1982). In cases involving sexual
16 molestation offenses under Rule 414, the Ninth Circuit has found
17 that the risk of unfair prejudice is evaluated by a consideration of
18 five factors: (1) the similarity of the other act to the act
19 charged; (2) the closeness in time of the other act to the act
20 charged; (3) the frequency of the other acts; (4) the presence or
21 lack of intervening circumstances between the other acts and the
22 charged offense; and (5) the necessity for the evidence beyond the
23 testimony already offered at trial. LeMay, 260 F.3d at 1027-28
24 (quoting Glanzer, 232 F.3d at 1268).

25 Here, applying the five LeMay factors, defendant's sexual
26 assault of his niece causes no unfair prejudice, because: (1) the
27 sexual assault is similar to the charged advertisement, because it
28 involves the exploitation of an infant/toddler, and even the

1 photography of that exploitation; (2) the sexual assaults took place
2 approximately a year before, and a month after, the charged
3 advertisement of infant/toddler pornography; (3) defendant molested
4 his niece at least twice, and as part of a regular practice of
5 sexually objectifying children; (4) no "intervening circumstances"
6 have either lessened the relevance or increased the prejudicial
7 effect of defendant's assault; and (5) defendant's confession to
8 molesting his niece is "necessary" to the government's case, because
9 it is "helpful" in demonstrating that that the subject of
10 defendant's advertisement in the #NEPILOVERS chatroom was child
11 pornography. See LeMay, 260 F.3d at 1026-28; (see also Dkt. 50 at
12 15-17.)

13 Additionally, the government disagrees with defendant's
14 contention that "[i]t is beyond dispute that the proffered evidence
15 of production of child pornography and sexual molestation are far
16 more disturbing than a statement seeking child pornography." (Mot.
17 at 9.) All of defendant's crimes have exploited and victimized
18 young children, and all of defendant's crimes are disturbing.

19 Thus, the evidence that defendant assaulted his niece (and
20 photographed that assault) causes no danger of unfair prejudice, and
21 does not substantially outweigh the highly probative value of that
22 evidence.

23 **D. CONFUSION AND DELAY UNDER FEDERAL RULE OF EVIDENCE 403**

24 Fourth, defendant argues that the Court should exclude the
25 evidence that defendant sexually molested his niece because the
26 evidence's probative value is outweighed by dangers of "confusing
27 the issues, misleading the jury, undue delay, [and] wasting
28 time. . . ." (Mot. at 12-13 (citing Fed. R. Evid. 403).) However,

1 first, defendant has waived trial by jury, and has pled guilty to
2 two of three charges brought against him. Second, the government
3 estimates that its case-in-chief will last no more than two days,
4 and has full confidence in the Court's ability to manage its
5 courtroom. Third, defendant's argument that he may face state
6 charges for molesting his niece is irrelevant and unavailing.
7 Defendant is charged here and now with a federal sex crime. The
8 government is entitled to prove its case, and to present the
9 evidence that supports it, in the manner it chooses -- and in a
10 manner supported by the Federal Rules of Evidence. Cf. United
11 States v. Old Chief, 519 U.S. 172, 183 (1997).

12 **E. THE SEXUAL ASSAULT'S ADMISSIBILITY, REGARDLESS OF RULE 414**

13 Finally, defendant's Motion overlooks the fact that defendant's
14 molestation of young children, both before and after the charged
15 advertisement, is also (1) inextricably intertwined with the charged
16 offense, and (2) admissible under Federal Rule of Evidence 404(b) to
17 prove, e.g., defendant's knowledge, motive, intent, plan, identity,
18 absence of mistake, and lack of accident. (See Dkt. 50 at 8-10, 17-
19 20.)

20 **V. CONCLUSION**

21 For the foregoing reasons, the government respectfully requests
22 that the Court deny defendant's Motion.

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